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No. 94-1614

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF WISCONSIN,
Petitioner

v.

CITY OF NEW YORK, et al.,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF COMMONWEALTH OF PENNSYLVANIA
AS AMICUS CURIAE IN SUPPORT OF
PETITIONER

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INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania submits this brief in support of the petition for writ of certiorari of the State of Wisconsin, and urges the Court to grant the petition to address the important question of the appropriate standard of review of decisions of the Secretary of Commerce related to the national census.

Unless the decision of the Secretary not to adjust the 1990 census is shown to be "essential" for the achievement of a "legitimate governmental interest," Pet. App. 40, the Court of Appeals' decision will require a mid-decade reapportionment of Congress which would result in the loss by Pennsylvania of another seat in the House of Representatives and an elector in the Electoral College. Pet. App. 87. In addition, because the Constitution of

Pennsylvania provides for the reapportioning of the Commonwealth based upon the results of the "official reporting of the Federal decennial census as required by Federal law," PA. CONST. ART. 2, §17, an adjustment to the 1990 census results could call into question the validity of Pennsylvania's reapportionment of its General Assembly.

For these reasons, the Commonwealth of Pennsylvania joins the State of Wisconsin in urging the Court to grant the petition for writ of certiorari and, upon review, reverse the decision of the Court of Appeals for the Second Circuit.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION CONCERNING THE APPROPRIATE STANDARD OF REVIEW OF DECISIONS OF THE SECRETARY OF COMMERCE.

Discarding the well-settled principle of affording substantial deference to high level Executive Branch officials concerning specialized matters within their areas of delegated responsibility, the Court of Appeals for the Second Circuit has embarked on a dangerous course. Albeit with the apparent goal of assuring what it regards as an appropriate level of scrutiny of executive officials' decisions, the Court of Appeals' decision rejected the thoughtful analysis of the District Court and substituted a more stringent standard of review which is not supported by applicable decisions of this Court. As such, the decision of the Court

of Appeals raises an important question concerning the appropriate standard of review of decisions of the Secretary of Commerce in an area that affects the States' vital interest in representation in the national government, and thus calls for the Court's guidance.¹

Although the Court has held that census decisions affecting apportionment are justiciable, Franklin v. Massachusetts, 505 U.S. ___, ___, 112 S.Ct. 2767, 2776 (1992), the Court has not retreated from the principle that decisions of the Secretary should be upheld so long as they do not "hamper the underlying constitutional goal of equal

¹ In addition to the importance of the question presented, the decision of the Court of Appeals conflicts with decisions of the Sixth and Seventh Circuits. (See Petition at 16-18).

representation." Id. at ___, 112 S.Ct. at 2778.

In Franklin, the Court upheld the decision of the Secretary to allocate overseas federal employees to their home states for purposes of the 1990 census and congressional reapportionment against a challenge of unconstitutionality under Article I, §2, cl. 3, and the Fourteenth Amendment. The Court concluded that the Secretary's decision was "consonant with, though not dictated by, the text and history of the Constitution," 505 U.S. at ___, 112 S.Ct. at 2778, and that the plaintiffs had not demonstrated that elimination of overseas employees from the States' counts would make representation in Congress "more equal." Id. Thus, while a challenge to the Secretary's decision may be justiciable, the Court has not abandoned the traditional level of

reduced scrutiny for such a decision, even where the important question of the right to vote may be involved.

The Constitution authorizes Congress to enact legislation to carry out the responsibility of conducting an actual enumeration of the people. U.S. CONST. ART. I, §2, cl. 3; ART. I, §8, cl. 18. Congress, in turn, has delegated to the Secretary of Commerce the duty of taking the census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. §141(a). The Bureau of the Census, an agency within the Department of Commerce, actually conducts the census. 13 U.S.C. §2. In carrying out these functions, however, the Secretary is not required to reach the most perfect result; his discretion is to be guided by the standard of accuracy as nearly as

practicable. See Wesberry v. Sanders, 376 U.S. 1, 7 (1964).

The principle that the Secretary should provide the most accurate census practicable nonetheless does not mean that his decision rejecting an adjustment to the 1990 census was unconstitutional. As the Secretary's written memorandum plainly reveals, Pet. App. 135, his decision was informed by many factors, none of which was inappropriate to consider, and those which the respondents specifically challenged were examined by the District Court. Pet. App. 69-89. With the agreement of the respondents, the guidelines which the Secretary considered left him with "enormous discretion." Pet. App. 89. The parties thus having agreed to those guidelines and the District Court having examined the Secretary's consideration of them for abuse of

discretion, the Court of Appeals should not have re-examined the guidelines in the more exacting manner in which it did.

The standard of review adopted by the Court of Appeals imposes upon the Secretary a greater burden than required by either the language of the Constitution, ART. I, §2, cl. 3, or applicable decisions of the Court. Franklin v. Massachusetts, 505 U.S. at ___, 112 S.Ct. at 2777. The Court also has recognized that the goal of equal representation is "illusory for the nation as a whole" due to the nature of the constitutional framework and the compromises required by the framework. Department of Commerce v. Montana, 503 U.S. ___, ___, 112 S.Ct. 1415, 1429 (1992). The "polestar of equal representation does not provide sufficient guidance to allow . . . a single

constitutionality permissible course." Id.

The District Court expressly found that respondents had failed to demonstrate that at the national, state or local level the adjusted numbers would be superior to the census numbers for any reasonable definition of census accuracy. Pet. App. 78. The Court often has recognized the deference to be accorded Executive Branch officials in making the judgment calls required by their position, especially in such specialized or technical areas. See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984); Fidelity Federal Savings and Loan Assn. v. De La Cuesta, 458 U.S. 141, 153-54 (1982).

If [the administrator's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the

statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Fidelity, 458 U.S. at 154. In this case, what may be "practicable" should not mean the same as what is "theoretically possible." As Wisconsin cogently notes in the petition:

The choice of procedures for taking the most accurate census requires the balancing of technical and policy trade-offs, often entailing resource allocation decisions, coupled with complex and uncertain predictions concerning a specific methodology's effect on representational equality, as to which "[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer."

Pet. at 23-24, quoting Department of Commerce v. Montana, 503 U.S. at ___, 112 S.Ct. at 1429. See also Tucker v. Department of Commerce, 958 F.2d 1411, 1418-19 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992).

Having exercised his discretion in a manner that was not arbitrary or capricious, the Secretary should have been entitled to the deference traditionally afforded high-level officials in such specialized areas of delegated responsibility. The Court of Appeals' decision to substitute a more exacting standard of review for that employed by the District Court should be reviewed by the Court, particularly in a case where, if unreviewed, the decision could result in a change to the decennial census five years into the decade and cast federal and state reapportionment into disarray.

CONCLUSION

The Court should grant the petition for writ of certiorari and, upon review, reverse the decision of the Court of Appeals.

Respectfully submitted,

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